

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DEBRA SCANDONE	:	CIVIL ACTION
	:	
v.	:	
	:	
JO ANNE BARNHART	:	NO. 05-4833

Baylson, J.

July 18, 2006

MEMORANDUM

Plaintiff Debra Scandone (“Plaintiff” or “Scandone”) filed two separate civil actions against the Commissioner of the Social Security Administration (“Defendant” or “Commissioner”) concerning the denial of her petitions for Social Security Disability Insurance benefits (“DIB”) and Supplemental Security Income (“SSI”). Both civil actions resulted in remands, and the claims were subsequently consolidated. It is Plaintiff’s contention that Administrative Law Judge Suzanne S. Strauss (the “ALJ”) issued a partially favorable decision on June 18, 2005, finding Plaintiff disabled beginning April 1, 2004, but not before that date. Plaintiff subsequently took advantage of her right to seek judicial review of the unfavorable portion of the ALJ’s decision and filed this civil action on September 9, 2005.

Presently before the Court is Defendant’s Motion to Remand (Doc. No. 4) filed on November 14, 2005. Plaintiff filed a response on November 23, 2005. Defendant is seeking remand because, despite having made all reasonable efforts to locate the hearing tape, she has been unable to do so and therefore cannot complete the administrative record in this case. The Court held a telephone conference with counsel on April 28, 2006 and subsequently placed the case in suspense while Defendant continued to search for the missing tape. The parties submitted

additional briefs, Plaintiff filing an amended response to Defendant's Motion to Remand and Defendant submitting a reply, and the Court held a second telephone conference on July 11, 2006.

Defendant's motion seeks a voluntary remand of the case to the Commissioner pursuant to the sixth sentence of 42 U.S.C. § 405(g), the relevant language of which reads as follows: "The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security" In considering what could be considered "good cause" for remand, a congressional conference committee reporting on the Social Security Disability Amendments of 1980 wrote that "Where, for example, the tape recording of the claimant's oral hearing is lost or inaudible, or cannot otherwise be transcribed, or where the claimant's files cannot be located or are incomplete, good cause would exist to remand the claim to the [Commissioner] or appropriate action to produce a record." H.R. Conf. Rep. No. 96-944, at 59 (1980), reprinted in 1980 U.S.C.C.A.N 1392, 1407.

Plaintiff opposes Defendant's Motion to Remand because she believes that any remand order from this Court must be qualified. She contends that granting the order requested by the Defendant "would constitute an inappropriate delegation of the Court's authority to the Commissioner," Pl's Resp. at 2, and maintains that she should not be penalized due to the negligence of the Commissioner in constructing and maintaining the administrative record.

Plaintiff also argues that the language of the sixth sentence § 405(g) does not limit the Court to granting or denying a request for remand without qualification. She asserts that the terms of a remand order are within the discretion of the Court and that instructions should be

issued as to what may or may not be considered in post-remand proceedings. Specifically, Plaintiff contends that the order granting a remand in this case should prohibit de novo adjudication of the determination that Plaintiff was disabled as of April 1, 2004. Plaintiff claims that it would be patently unfair to punish her for the negligence of the Commissioner in misplacing the hearing tape in this case. As an example of an attempt to limit the examination of the earlier findings of an ALJ upon remand, Plaintiff attached as an exhibit to her response a motion to remand pursuant to sentence six of § 405(g) from a 2001 case before Judge Lowell Reed of this Court. See Pl's Resp., Ex. A at 3 (Branson v. Massanari, Civil Action No. 01-1372) (noting that "[t]he favorable decision made on plaintiff's claim, with respect to plaintiff's onset date of disability beginning February 1997, will not be an issue considered by the ALJ at the hearing held pursuant to an order granting this request for remand"). Plaintiff also submitted as an exhibit the order subsequently issued by the Branson court, which specifically required that the determination of disability should not be revisited upon remand. See Pl's Resp., Ex. B at 1 (Branson July 9, 2001 Order).¹

Defendant characterizes Plaintiff's response as a request for waiver of the Commissioner's reopening provisions, a waiver to which Defendant is unwilling to consent. See Def's Br. at 2 n.1. Under the relevant regulations, the Commissioner does have the power to

¹ The Motion for Remand filed by the Assistant United States Attorneys in Branson specifically requested that the favorable decision on the plaintiff's social security claim would not be an issue considered by the ALJ during any hearing held pursuant to the order granting a request for remand. Here, we have no such agreement between the parties. Defendant, in her brief, notes simply that "[o]pposing counsel *alleges* that Plaintiff received an award of benefits as of April 1, 2004 . . ." Def's Br. at 2 n.1 (emphasis added). Defendant also noted that "[t]he Commissioner's counsel does not consent to opposing counsel's request and therefore notes Plaintiff's opposition to the request for a sentence six remand." Id.

reopen a final determination or decision on its own initiative, and having chosen to do so, the Commissioner “may revise that determination or decision.” See 20 C.F.R. 404.987, 416.1487 (DIB and SSI, respectively). The Commissioner may reopen a “determination, revised determination, decision, or revised decision” for any reason within twelve months of the date of the notice of the initial determination. Id. at 404.988, 416.1488 (DIB and SSI, respectively).

A sentence six remand is generally appropriate before the Commissioner has answered the Complaint. See Shalala v. Schaefer, 509 U.S. 292, 297 n.2 (1993) (“Sentence-six remands may be ordered in only two situations: where the Secretary requests a remand before answering the complaint, or where new, material evidence is adduced that was for good cause not presented before the agency.” (citing Melkonyan v. Sullivan, 501 U.S. 89, 99–100, 100 n.2 (1991); Sullivan v. Finkelstein, 496 U.S. 617, 626 (1990))). Here, by Plaintiff’s own admission, the notification of the ALJ’s initial determination was achieved on or about June 18, 2005, and Defendant’s Motion for Remand was filed on November 14, 2005, approximately five months later. Plaintiff has conceded that a lost hearing tape constitutes good cause for remand under sentence six of § 405(g), and courts have upheld remand under such circumstances. See, e.g., Shank v. Barnhart, 2002 WL 1839163 (E.D. Pa. Aug. 9, 2002). Nonetheless, although the regulations permit the reopening of a determination for any reason at all within twelve months of the notification of the initial determination, it seems unfair to Plaintiff to permit the Commissioner to misplace the hearing tape and then “reconstruct the record” by holding a new hearing before the ALJ, potentially reversing Plaintiff’s prior favorable decision. Thus, the Court will, in the interest of

fairness, qualify the remand order as Plaintiff has requested.² The case will be remanded to the Commissioner for further administrative proceedings, but the determination that Plaintiff has been disabled since April 1, 2004 will not be subject to de novo adjudication.

An appropriate Order follows.

² In her reply to Plaintiff's amended response, the Commissioner did provide an alternative to the remand, proposing a certification of the administrative record without the inclusion of the March 31, 2005 hearing testimony. Plaintiff, however, was unwilling to adopt this course, and the Court will not require such action. Simply put, the Social Security Administration misplaced the hearing tape, and the Court finds it unfair to require Plaintiff to again demonstrate disability as of April 1, 2004.

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ORDER

AND NOW, this 18th day of July, 2006, the Court having held two telephone conferences with the parties, and after careful consideration of the briefs, it is hereby ORDERED as follows:

1. The Clerk shall transfer the above entitled case from the Civil Suspense File to the current docket;
2. Defendant's Motion for Remand (Doc. No. 4) is GRANTED IN PART and DENIED IN PART;
3. Pursuant to sentence six of 42 U.S.C. § 405(g) the Claim is remanded to the Commissioner for further administrative proceedings, but the determination that Plaintiff has been disabled since April 1, 2004 shall not be subject to de novo adjudication.

The Clerk shall close this case.

BY THE COURT:

s/ Michael M. Baylson
MICHAEL M. BAYLSON, U.S.D.J.